DISPUTES PROCESS

Richard L. Hanson
Deputy Chief Trial Attorney
Deputy Director, Contract Appeals
AFMC Law Office/JAB
Wright-Patterson AFB

Richard.Hanson@wpafb.af.mil
(937) 255-6111, ext 229

Contract Litigation Fora

- GAO
- U.S. District Courts
- ASBCA
- Court of Federal Claims
- Court of Appeals, Federal Circuit

Protests v. Disputes

Contract Formation v. Contract Administration

- Protests to Agency
- Protests to GAO
- Bid Protest Reports

Procurement Awards v. Disputes

Three-Year Comparison

Air Force Procurement Awards, FYs 97-99:
3,819,963

Source: ***web1.whs.osd.mil/peidhome***
DoD Directorate for Information Operation & Reports, Procurement and Economic Information

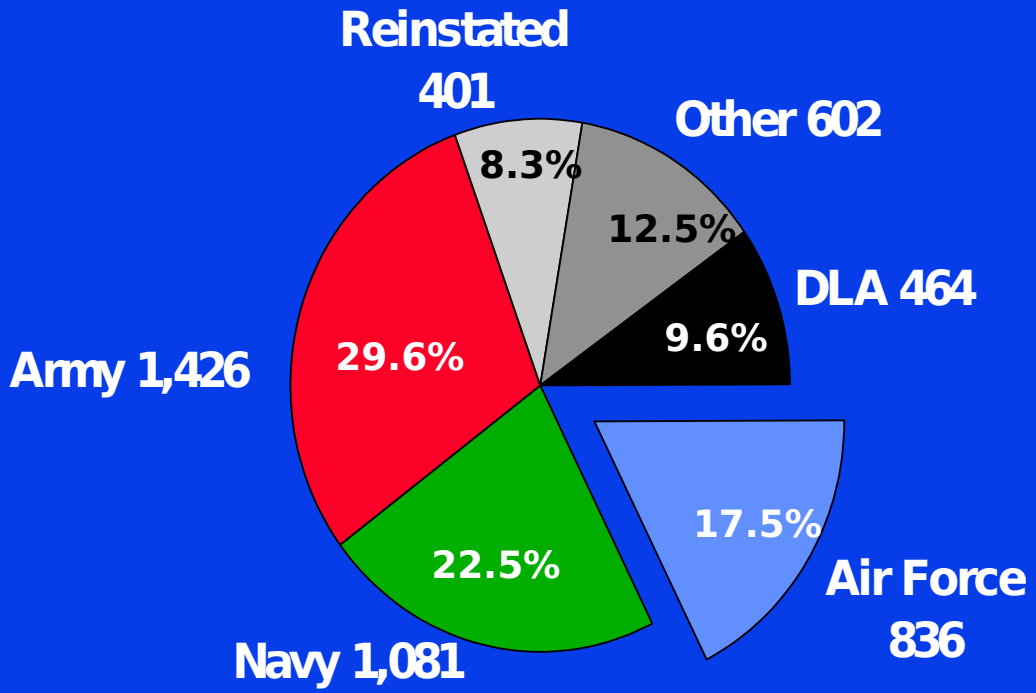
Air Force Contract Disputes, Fys 97-99 (ASBCA):
416

Source: **Annual Reports of Chairman, ASBCA, to SECDEF and Service Secretaries**

Comparative Ratio-- 1 : 9,183

ASBCA Case Distribution

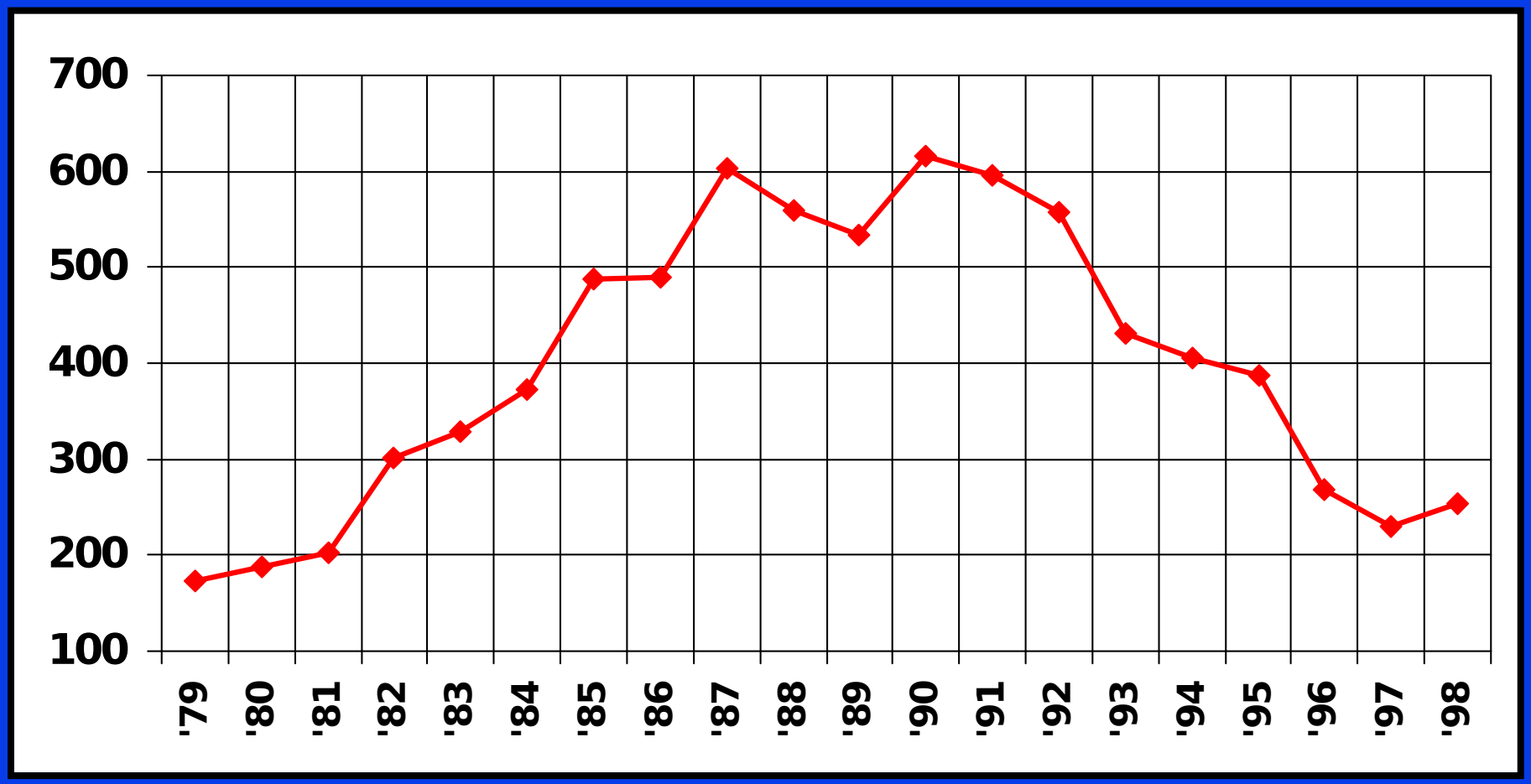
Source of Appeals Docketed, FYs 1995-99 (Five Years)



Data from ASBCA Annual Reports to DoD

Air Force Contract Litigation

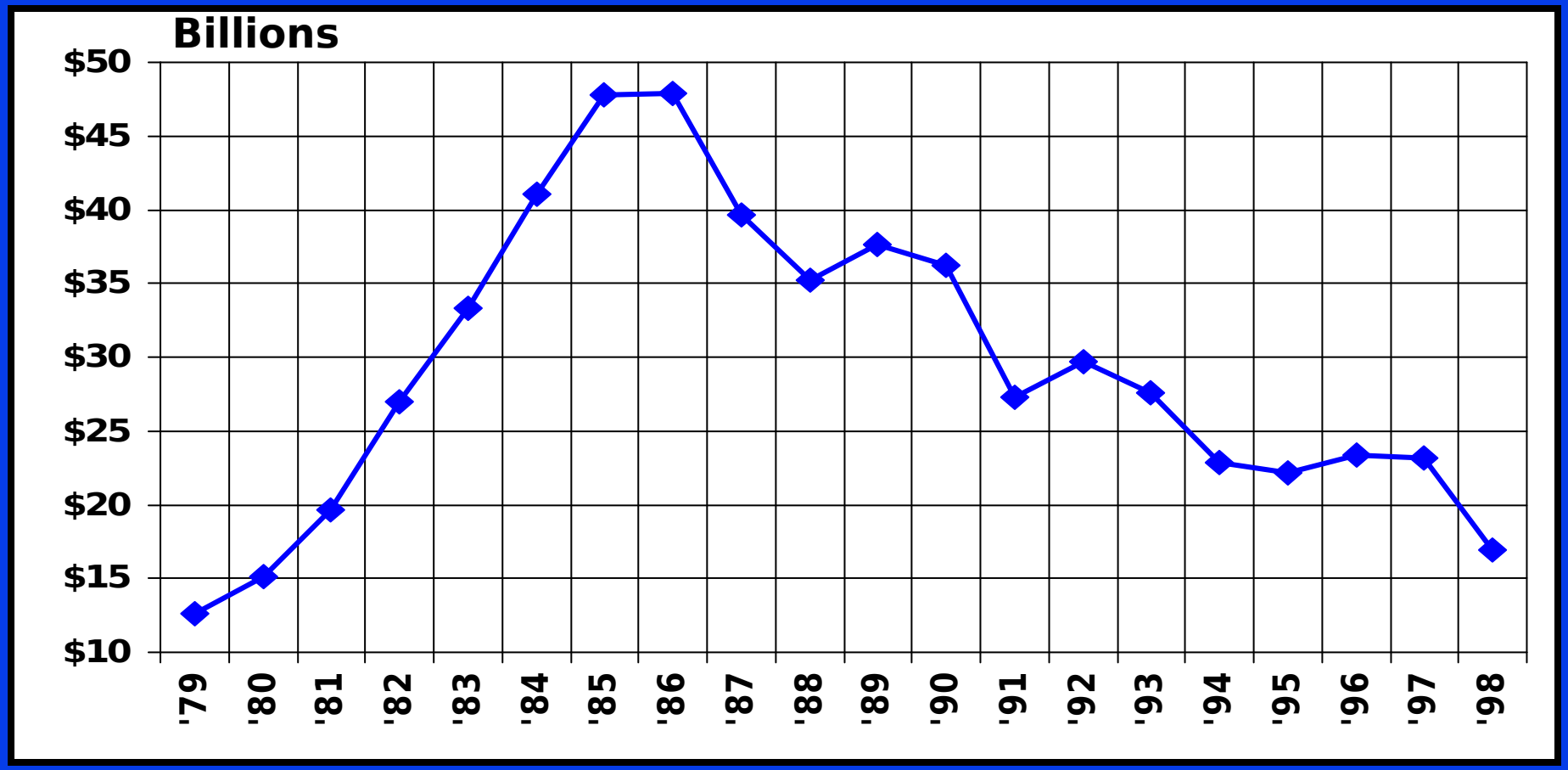
Cases Pending at End of Fiscal Year



Data From ASBCA Annual Reports to DoD--Reinstated Cases Included

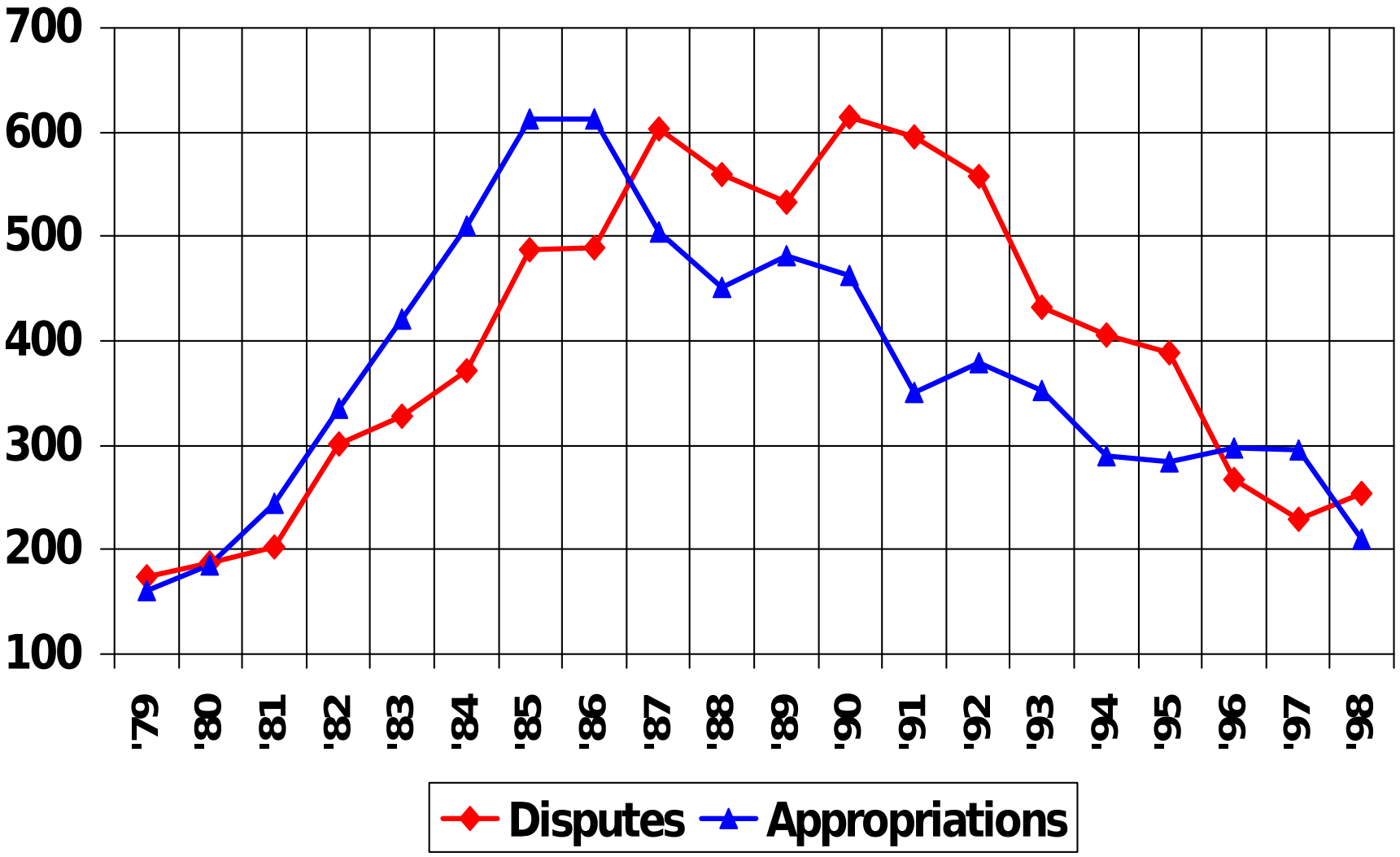
Air Force Procurement Appropriations

Aircraft, RDT&E, and Missile Procurement



(Fiscal Years; No Adjustments for Inflation)

AF Appropriations, Disputes -- Interrelated



Claim: What Must be Shown?

"A claimant need not prove his damages with absolute certainty or mathematical exactitude. . . . Yet this leniency as to the actual mechanics of computation does not relieve the contractor of his essential burden of establishing the fundamental facts of liability, causation, and resultant injury."

--*Wunderlich Contracting Co. v. United States*, 351 F.2d 956 (Ct.Cl. 1965); *Addison Miller, Inc. v. United States*, 70 F.Supp. 893, 108 Ct.Cl. 513 (1947), *cert. denied*, 332 U.S. 836, 68 S.Ct. 217 (1947)

Contracting Officer's Final Decision
(FAR 33.211, AF FAR Supp. 5333.211)

- Description of Claim or Dispute
- Reference to Pertinent Contract Terms
- Statement of Factual Areas of Agreement and Disagreement
- Statement of Decision, with Supporting Rationale
- Appeal Rights Paragraph (FAR 33.211(y))

F/D Issuance -- Timing
(FAR 33.211, Contract Disputes Act)

- **Claims of $100,000 or Less -- 60 Days After Request**
- **Claims > $100,000 60 Days After Claim Certification** -- Or, Notify w/in 60 Days of When Decision Will Be Issued -- Must Choose a Reasonable Date (Lots of Latitude)
  - Size and Complexity of Claim
  - Adequacy of Contractor's Supporting Data
  - "Any Other Relevant Factors"

  -- Once Chosen, MUST Meet That New Date
- **Miss the Date? "Deemed Denial" Appeal Likely**

  -- Forfeits a Chance to Convince the Judges

33 Cent Filing Fee

- **Contract Disputes Act of 1978**
  - Written Claim
  - Certification if over $100,000
  - Contracting Officer's Final Decision

- ***CDA: § 607(e): "An Agency board shall provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes . . ."***

- **Contractor's Election to Litigate**
  - Can Choose Not To (a Frequent Choice)
  - ASBCA (90 Days)
  - Court of Federal Claims (1 Year)

Which Forum?

- Contractor Gets to Choose
- 95% AF Appeals to ASBCA
  -- AFMC LO/JAB Represents AF
  -- Army CTA, Army Appeals Except:
  -- Engineer CTA, if < $3 Million
- 5% (AF) Appealed to Court of Fed Claims
  -- Dept. of Justice Representation

Continuing Responsibilities
(AF FAR Supp. 5333.290(a)(3))

"While an appeal is pending, the contracting officer shall render all assistance requested by the assigned Air Force trial attorney including, but not limited to, locating and arranging for the presence of all potential Government witnesses, and marshaling Government records and other required physical evidence for conferences and hearing necessary to defend or otherwise dispose of an appeal."

Litigation Isn't Free

- **Program Office/Contracting Activity Costs**
  - Witness Travel
  - Document Production, Depositions
  - Document Databasing (if necessary)
  - Expert Witness Funding
  - Distraction from Usual Duties
  - *However*, Don't Have to Pay the Trial Attorney!
- **More Expensive for Contractor**
  - Attorney Fees of $200-$300-$400/hr.
  - But Sometimes Treated as Separate Profit Center

"Rule 4 File"

- **30 Days After Docketing**
- **Serves as Initial Evidentiary Record**
- **Noncontroversial Initial Submission**
  - -- Decision from Which Appeal is Taken
  - -- Contract, Pertinent Specifications, Drawings, Etc.
  - -- Relevant Correspondence
  - -- NOT Privileged Material
  - -- Detailed Table of Contents, Separate Tabs for Docs

Comprehensive Report to CTA
(AFAR 33.212-90-3)

- Potential Witness List
- Signed Statement of Each Gov't Witness
- Analysis of Allegations, Strengths/Weaknesses
- Analysis of Legal Issues
- Contract Settlement Review Board Report

Pleadings

Initial Presentation of Issues

- **Complaint w/in 30 Days**

  -- Filed by Contractor (Appellant)

  -- “simple, concise and direct statements of each of its claims . . . the basis, with appropriate reference to contract provisions, of each claim and the dollar amount claimed”

- **Answer 30 Days After Complaint**

  -- Admit or Deny, with Reasons (True/False Test)

Development of Issues, Proof

- Discovery (90% of Pre-Trial Effort)
  - Document Production
  - Interrogatories
  - Depositions
  - Requests for Admission
  - Stipulations

Discovery

- **Interrogatories**
  - -- Legitimate Fishing Expedition
  - -- Questions that Might Lead to Relevant Evidence
  - -- Answers Under Oath (by Contracting Officer)
- **Request for Document Production**
  - -- Contemporaneous Materials Are Valuable
  - -- “Here’s Our Warehouse -- Come and Look”
- **Requests for Admission**
  - -- Eliminate Noncontroversial Issues
  - -- Not Really Discovery (Things Both Sides Know)

Limitations on Discovery

- **Not Many -- Fishing is Fine**
- **Privileges**
  - -- Attorney Work Product
    By or for Attorney, Connection with Litigation
  - -- Attorney-Client Privilege
    Communications from Client to Attorney with Expectation of Confidence
- **Protective Order**
  - -- Proprietary Data, Cost Data, Trade Secrets, Etc.
  - -- Can't Withhold, but Can Ask for Disclosure Limits

Depositions

- **Most Useful Discovery Technique**
- **Sworn Testimony, w/o Judge**
  - Witness (“Deponent”)
  - Attorneys from Each Side
  - Court Reporter
- **<u>Not</u> Substitute for Trial**
- **Learning and Practice Session**

Litigation Support
Document Databasing, Contracted Analysis, Etc.

- **Essential if Millions of Documents**
- **Rarely Needed**
  - 18 Times in Last 6,531 AF ASBCA Cases Resolved
- **Expense**
  - Borne by Program Office/Contracting Activity
    -- $27.6 Million, But $4.6 Billion in Controversy
    -- Example: $157,236 Cost in $173.4 Million Case
  - Typically Ordered Under DOJ Lit Support Contract

Trial

- **Most Cases (about 75%) Settle, But . . .**
- **Can Be Anywhere (the Judge Decides)**

  -- What Location Makes Most Sense?
  -- Where Are Most of the Witnesses?
  -- Small Business? Probably at Their Location
  -- Major Defense Contractor, Large Dollars? At ASBCA

- **Single ASBCA Judge Presiding**
- **Presentation of Witness Testimony**

  -- Documents Usually Are Already in Evidence
  -- Contracting Officer Arranges Travel, Orders, Etc.
  -- Analogy: What if no litigation, but person's help needed?
  -- Direct Examination, Cross-Examination, Redirect, Etc.
  -- Trial Transcript Is Provided By ASBCA

Witnesses

- **Fact Witnesses**
  - -- Observed Through Person's Five Senses
  - -- Who Saw the Accident?
  - -- Shouldn't Need Subpoena for Gov't Employee
  - -- Entitled to be Compensated for Out-of-Pocket
- **Expert Witnesses**
  - -- Opinion Testimony
  - -- Based on Facts in Evidence, and Expertise
  - -- Typically Pre-Filed Direct Examination
  - -- Expert Owns His Opinions

Truth in Negotiations
(Negotiations v. Trial Testimony)

"Well, in a sense I'm saying that you know when you're negotiating you're negotiating with whatever tools you have and whatever arguments you can muster. The idea is to come home with as much as you can from the standpoint of the company and still present a fair and equitable deal, okay? So, if you have to be innovative or restrict certain arguments and cast things in various scenarios, as long as the discussion is appropriate, why not?"

--*Deposition of Manager of Contracts Accounting, Major Defense Contractor*

Who's Telling the Truth?

- **Does It Matter?**
  -- "Trust But Verify"

- **Claim Certification**
  -- Sometimes Useful
  -- Usually Not (Especially Lately)

- **Testimony Under Oath**
  -- The Truth Trilogy
  -- If Not Perjury Prosecution, at Least Discomfort

- **Cross-Examination**
  -- Only Real Tool to Assure Truthfulness
  -- Examiner Has Some Advantages

Cross-Examination

- **History**
  -- Trial by Combat, by Ordeal, by Oath-Giver
  -- Cross-Examination

- **"the most efficient means devised by the law for the discovery of truth"**
  -- *Louisville & N. R. Co. v. Gregory*, 144 S.W. 2d 519

- **"invaluable as a test of the accuracy, truthfulness and credibility of testimony"**
  -- *Aluminum Industries v. Egan*, 22 N.E. 2d 459

- **Not Available in ADR**

Closing Argument
(Summation to the Jury)

- **Post-Trial Briefs**
  - -- Typically Filed Simultaneously
  - -- 30/45/60 Days After Board Receives Transcript
  - -- Propose Findings of Fact, Plus Argument
  - -- Based on Evidentiary Record (Only!)
- **Reply Briefs**
- **"Ready-to-Write"**

Decision

- **When?**
  - -- Very Quick if Expedited or Accelerated
  - -- In September if Not
  - -- Average “Ready-to-Write” Time: 10.7 Months
- **Published (unless expedited)**
- **Signed by 3-5 Judges**
  - -- Not Necessarily the Hearing Examiner
  - -- One Judge Writes, Two (or More) Concur

Decision's Out-- Are We Home Yet?

- **Can Ask for Reconsideration (30 days)**
- **Appeal to CAFC**
  - -- Either Party, w/in 120 Days
  - -- Gov't: w/Consent of Agency Head and AG
- **Either One Is Usually a Waste of Time**

Equal Access to Justice Act

- **U.S. Gov't Liable for Litigation Costs**

  -- Waiver of Sovereign Immunity
  -- Inconsistent with "American Rule"
  -- Available Only to Small Businesses
  -- Limitations on Recoveries
  $125/hour for Attorney
  Can't Recover for Employee's Costs
  -- Contractor Must Have Substantially Prevailed
  -- Costs Paid by Contracting Activity

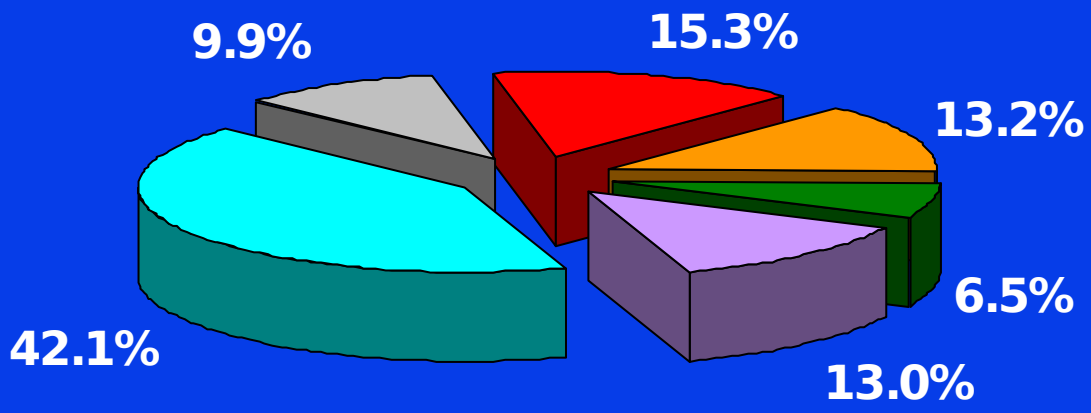
- **Lesson: Litigation Can Cost More**

Results?

- Numbers
- Dollars
  - -- Amounts
  - -- Percentages
- Return on Investment

How Are AF Disputes Resolved?

(Fiscal Years 1997-1999)



Lengthy Process?

- Expedited/Accelerated, 120-180 Days
- 53.1% Resolved in First Year
- 77.1% Resolved within Two Years
- 2.8% Take More Than Five Years
- Average Time from Docket to Decision is 21.8 Months
- “Ready to Write” Time 10.7 Months

ADR
(Appropriate Dispute Resolution)

- **Need to Know Facts First**
- **Useful Tool, National Policy**
- **Doesn't Substitute for Justification**
- **Not an ATM Machine**
- **Always Worth Considering**
- **Sometimes Not Appropriate?**
  - -- Purely Legal Issue
  - -- Clear Entitlement on One Side

ADR -- A Decision to Forgo:

- **Ability to Compel Discovery Answers***
- **Ability to Force Document Production***
- **Sworn Pre-Hearing Testimony***
- **Evidentiary Rules** (authentication, impeachment, etc.)
- **Cross-Examination**
- **Published Decision -- Precedent**